

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 243 OF 2021

BETWEEN : **ANOOP KUMAR** of Nacovi, Nadi, Farmer as Beneficiary in the Estate of Surendra Prasad, Deceased
PLAINTIFF

AND : **ARUN KUMAR** of 77 The Cascades, Mount Annan NSW 2567, Australia
1ST DEFENDANT

AND : **ADIT KUMAR** of 11 Tamworth Crescent, Hoxton Park, NSW 2171, Australia
2ND DEFENDANT

AND : **NALINI PRAHALAD** of 9665, 117B Street, Surrey BC V3V4A6, Canada
3RD DEFENDANT

AND : **PARBINA BALGOVIND** of 12/116 Albert Street, Goodna, Queensland 4300, Australia
4TH DEFENDANT

AND : **ROHINI LODHIA** of Unit 7, 6-8 Forbes Street, Warwick Farm, NSW 2170, Australia
5TH DEFENDANT

AND : **KESHNI CHANDRA** of 11846 100 Avenue, Surrey BC, V3V2W1, Canada
6TH DEFENDANT

AND : **LALIKA LATIKA DEVI** of 56 Bowerbird Street, Hinchinbrook, NSW, 2168, Australia
7TH DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. R. Singh, for the Plaintiff
Mr. R. Charan, for the 1st, 2nd, 5th, 6th & 7th Defendants
Mr. K. Siwan, for the 4th Defendant

DATE OF HEARING : 7th July, 2023

DATE OF JUDGMENT : 20th September, 2023

JUDGMENT

A. INTRODUCTION:

1. This judgment is pronounced pursuant to the hearing held before me on 7th July 2023 in relation to the Originating Summons dated 2nd November 2021 and filed on 17th November 2021 by the Plaintiff against the Defendants, seeking the following reliefs.
 - a. *THAT leave be granted to issue proceedings against the Defendants.*
 - b. *THAT leave be granted for the substituted service of the affidavit in support and Originating Summons and leave be granted that all papers be served on the Defendants ARUN KUMAR, ADIT KUMAR, NALINI PRAHALAD, PRAVEENA BALGOVIND, ROHINI LODHIA, KESHNI CHANDRA and LALIKA LATIKA DEVI by way of Registered mail on the above respective addresses within the jurisdiction of this Honourable Court.*
 - c. *THAT this Honourable Court order the sale of the land comprised in State Lease Number 717923 on such terms as this Honourable Court may deem fit in the circumstances.*
 - d. *ANY further or other order as this Honourable Court may deem fit in the circumstances.*
 - e. *Costs.*

B. THE BACKGROUND:

2. The Plaintiff and the Defendants are siblings. Admittedly, all of them are beneficiaries of the Estate of their late Father, Surendra Prasad, who died intestate.

The Plaintiff is the appointed Administrator of the Estate of Surendra Prasad, in terms of the Letters of Administration bearing Number 18522 issued on 9th September 1982, and marked as "A" to the Plaintiff's Affidavit in support.

The Estate property is Crown Lease No. 717923, which comprises of 7. 3764 hectares, approximately in the extent of 18.22 acres (vide annexure "B" to the affidavit in support).

The tussle between the plaintiff and the Defendants, except for the 3rd Defendant, is about the distribution of the subject matter land among them. The 3rd Defendant is said to have renounced her interest in favour of the Plaintiff.

C. PRIOR PROCEEDINGS:

3. Prior to the commencement of this proceedings by the Plaintiff in his, purported, personal capacity, by way of Originating Summons on 17th November 2021, as averred in paragraph 5 of his Affidavit in support, there has been the probate action No-06 of 2010 at the High Court of Suva, wherein Justice A.I.B.B. Muthunayagam (as he then was) had on 15th of July 2015 delivered a judgment against the Plaintiff hereof, who was the Defendant therein (as the Administrator) to do the followings;

- a. *The defendant shall provide the plaintiffs with full and complete accounts of the income and expenditure on the Farm and all monies received on the sale of the land within 14 days of this judgment.*
 - b. *The distribution of the balance of the estate to the beneficiaries shall be completed within 3 months from the date of this judgment.*
4. The 1st, 2nd, 5th, 6th, and 7th Defendants in paragraph 5 of their Affidavit in response, having admitted the said proceedings, in paragraph 6 thereof have revealed that the Plaintiff, as the Defendant thereof, was found guilty on 2nd of February 2017 for committing the contempt of Court for wilfully disobeying the above judgment as per annexure "AK-3" and was sentenced on 21st March 2017 as per the annexure marked as "AK-4". The sentences imposed by Muthunayagam-J are as follows:
- i. *"I impose a fine of \$5,000.00 on you. In default of payment of the said fine within a period of 30 days from the date of this sentence, I commit you to prison for a period of 3 months.*
 - ii. *I order you to comply with my Order of 15th July, 2015, and distribute the balance of the estate to the beneficiaries within a period of 60 days from the date of this sentence. If you default, I commit you to prison for a period of 3 months.*
 - iii. *I order you to pay the second and third plaintiffs' costs in a sum of \$1000 summarily assessed within 15 days of this sentence."*
5. As per paragraph 6 (c) of the Affidavit in opposition, it is also revealed that the plaintiff hereof, as the Defendant in the said probate Action 06 of 2010, had filed a Summons moving to pay out to the beneficiaries \$5,000.00 each in lieu of their right/ interest, and the Court on 2nd February 2017 dismissed the said Summons, by finding that the Summons was inconsistent and in contempt of the Orders of that Court made on 15th July 2015. Vide "AK-5".
6. As per paragraph 6 (d), it is further revealed that the Plaintiff, as the Appellant, though moved to Appeal the decision of the High Court in the Probate Action No- HPP 06 of 2010, the Court of Appeal by its Order dated 30th November 2018 dismissed the leave to Appeal out of time by finding, among other things, that the Appellant appears to be looking into the loopholes in order to get away from distribution of the estate. Vide "AK-6". Accordingly, the Plaintiff till this day is said to be in default and contempt of the Court Order delivered on 15th July 2015 in respect of the same subject matter land.
7. However, the Plaintiff, as the Administrator in the said Action, said to have executed the Transfers in the year 2017 as per annexures marked as "D" to the Affidavit in support, but the process has not been finalized due to the failure on the part of the plaintiff, though those transfers were consented by the Minister of Lands and Mineral resources on 31st May 2021 as per annexures marked as "AK-7".
8. The Defendants, while acknowledging the fact that the estate does not have a Tax Identification Number (TIN), are making allegation that though the Plaintiff, as the Administrator, had the duty to obtain the TIN number, he has failed to file Tax returns and to obtain Capital Gain Tax Certificates, as pointed out by the letter marked as "AK-8" dated 18th January 2022 sent by the Fiji Revenue & Customs.

9. Defendants state that they are entitled to their shares of the estate as the beneficiaries of the Estate as they have a sentimental value for it, they can obtain separate Cane Contracts for each lot and they can attend to the rezoning of their shares of land and for sub division. The defendants aver that the plaintiff is still in contempt of Court, he is delaying the process, and therefor move for the dismissal of this action.

D. THE EVENTS BEFORE THIS COURT:

10. It is in the above backdrop; the Plaintiff has filed this action in hand seeking for the sale of the subject Land under section 119 of the Property Law Act. For the sake of clarity, I shall describe the events that occurred in this court as follows.
- a. The Plaintiff on 16th November 2021, obtained from the learned Master, an Order to issue proceedings against the Defendants, an Order for the service the Originating Summons out of this Jurisdiction as prayed for in his Ex-parte Notice of Motion filed on 3rd November 2021, and an Order for substituted service by registered post as per the prayer (b) above in the Originating summons.
 - b. The Summons being issued on all the defendants, the 4th Defendant filed her Acknowledgement of service on 5th January 2022 through Messrs Rams Law, while the 1st, 2nd, 5th, 6th and 7th Defendants filed their acknowledgment of service on 28th January 2022 through by Mr. Ravneet Charan Lawyers.
 - c. The 1st, 2nd, 5th, 6th, and 7th Defendants, on 9th March 2022 filed a scan copy of their Affidavit in opposition sworn by the 2nd Defendant on 7th March 2022, and thereafter on 15th March 2022 filed the original thereof, both together with annexures marked as "AK-1" to "AK-8". The 4th Defendant, having filed a scanned copy of her Affidavit in response on 31st May 2022, filed the Original thereof on 9th September 2022 with no documents attached.
 - d. The Plaintiff filed his Affidavit in reply only for the 4th Defendant's Affidavit in opposition, and did not file any reply to the Affidavit in response by the 1st, 2nd, 5th, 6th and 7th Defendants. The 3rd Defendant did not file Affidavit in response as she is said to have renounced her rights and interest in the subject matter in Favor of the Plaintiff.
 - e. On 24th May 2022, the hearing being fixed for 31st August 2022, when it came up for hearing, as the learned Counsel for the Plaintiff intimated that there could be a settlement among the parties for the Plaintiff to buy the land in question on an agreed valuation, and with the consent of the Defendants' Counsel, the hearing was vacated. Accordingly, 28 days were granted for the Plaintiff to file the valuation report along with a supplementary Affidavit.
 - f. Thereafter, on 3rd October 2022, though the Valuation report was ready, on an Application, further time was granted to file the same with an Affidavit (which was filed on the same day afternoon) and fixed the matter to be mentioned on 12th

October 2022, on which date parties were given further time till 25th November 2022 to consider and come up with the settlement or to have the matter fixed for hearing.

- g. On 25th November 2022, as the parties had failed to arrive at a settlement, the hearing was fixed for 18th January 2023. Accordingly, when the matter came up for hearing on 18th January 2023, what transpired before the Court are as follows.

Appearance

for the Plaintiff; Mr. R. Singh For the 1st, 2nd, 5th to 7th Defendants Mr. R. Charan with Mr. Singh.
For the 4th Defendant Mr. Siwan

Counsel's submissions:

"Counsel for the applicant (plaintiff) intimates that there is a possibility of settlement, subject to an alternative valuation and agreement of a price to be decided basing on both valuations, for his client to buy the property.

Counsel for the 4th Defendant and counsel for the other Defendants (Mr. Charan) agrees for the proposal. Accordingly, move for directions of consent".

Orders.

1. All the defendants (except for the 3rd defendant) are at liberty to submit an alternative valuation within 3 weeks.
2. ***The Applicant shall be at liberty to buy the property at a price to be agreed on consideration of both the valuation report.***
3. Mention for consideration on 16th February 2023 @ 10.30 am.
4. Orders shall be sealed.
5. Defendants are at liberty to name the valuer.
Sigd.

11. Accordingly, when the matter came up on 16th February 2022, parties obtained further one month time to consider the settlement, and it was fixed for settlement on 22nd March 2023, on which date further time being moved for by the Defendant's counsel to submit their alternative valuation report, the matter was mentioned for the same on 13th April 2023, 25th April 2023, and finally their alternative valuation Report was filed on 26th April 2023 with service on the plaintiff's Solicitors. Thereafter, when the matter was mentioned on 9th June 2023, further time being granted till 7th July 2023 for the Plaintiff to consider, as there was no settlement, the matter was finally heard before me on the same date.
12. In addition to the oral submission made at the hearing by the counsel for the parties, they have filed written submissions as well on aforesaid dates.

E. DETERMINATION:

13. The Plaintiff, in his Originating Summons, initially, relied on section 119 of the Property Law Act for his reliefs, which reads as follows;

"119. (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly".

14. If the Plaintiff is to obtain an order for sale of the Land in question pursuant to the above section, he has to satisfy the Court that his interest in the subject land is one moiety (half) or more than that. Undisputedly, there are 8 co-owners, including the Plaintiff, and he being the 1/8 owner, claims the 3rd Defendant's 1/8 share as well, who is said to have renounced her right & interest. Thus, his total entitlement is only 2/8 shares, while all other 6 defendants, who appear to be sailing together, remain as the owners of the larger extent, ie 6/8 shares.
15. The Plaintiff hereof does not have on his own or collectively a moiety or more than that in order to justify an order for the sale of the land. It was in the case of ***Atu v Atu [1983] FLR 100*** Fiji Supreme Court considered a similar application and stated as follows;

" it is mandatory to direct the sale of the property since the Plaintiff's interest in the property is not less than one moiety. A 'moiety' means a half..."
16. In ***Morris v. Mossirs (1917) 12 O.W.N 80 Middleton J.*** in dealing with a similar matter stated at p.81 *"Sale as an alternative for partition is quite appropriate when the partition cannot be done."*
17. In ***Gilbert v. Smith (1879) 11 Ch D.78. Jessel M. R., p.81*** stated :

"The meaning of the legislature was that when you see that the property is not such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money among the parties"
18. In ***Lalor v. Lalor (1883) 9 P.R. (Ont.) 455, Proudfoot J.***, who was deciding whether partition or sale should be ordered , stated:

"I do not think any party has a right to insist on a sale; and it will not necessarily be ordered, unless the Court thinks it more advantageous for the parties interested"
19. It has transpired through the Judgment in the HPP 06 of 2010 (the probate action in Suva) that the Plaintiff hereof, as the Administrator of the Estate of late Surendra Prasad, has already partitioned and sold certain number of lots out of the subject matter land, for which he is said to be still accountable to the beneficiaries. The extent of the remaining land is said to be more than 18 acres in extent. The Plaintiff has not adduced any ground why the land and premises cannot be partitioned, instead of going for a sale.
20. Learned Counsel for the Plaintiff in his submissions has switched his reliance from Section 119 (1) of the Land Transfer Act (the Act) to Section 119(2) of the Act, which reads as follows;

"119.(2) The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstance, a sale of the land would be for the benefit of the parties interested".

21. The Plaintiff in this matter has not adduced any convincing ground to justify the sale of the land in question, as an alternative for partitioning it among the beneficiaries. From the first date fixed for the hearing of this matter, the sole attention of the Plaintiff was to sell the land, relying on the, purported, grounds averred in paragraph 11 of the Affidavit in support. However, those grounds have already been addressed in the Ruling of the Probate Action HPP 06 of 2020 marked as "AK-5" and filed along with the Affidavit in opposition by the 1st, 2nd, 5th, 6th and 7th Defendants.
22. Initially, the Plaintiff obtained a valuation for a sum of \$65,000.00, with which the 1st, 2nd, 4th, 5th and 6th Defendants were not agreeable. Secondly, the said Defendants obtained a valuation for \$2,30,000.00 for which the Plaintiff was not agreeable, and finally a valuation from the Land Department was called, according to which the land was valued for \$70,000.00. As the parties could not agree on the quantum, no settlement was materialized. At no stage, this Court had permitted the sale and/ or given the right for the Plaintiff to purchase, except for by way of mutual agreement of the parties on the quantum of the price.
23. The contents of the annexures marked as "AK-3", "AK-4", "AK-5" and "AK-6", and annexed to the Affidavit in opposition by the 1st, 2nd, 5th, 6th and 7th Defendants, are not disputed by the Plaintiff. These documents confirm THAT:
 - a. By judgment dated 15th July 2015, the Plaintiff hereof was ordered by the Suva High Court in HPP Action No- 06 of 2010 to provide the full and complete Accounts of the income and expenditure of the estate.
 - b. By judgment dated 18th November 2016, he was found guilty for contempt of Court Orders.
 - c. On 21st March 2017, he was sentenced for the contempt charges.
 - d. By judgment dated 2nd February 2017, his Summons for the sale of the property was declined, with the cost of \$1,000.00.
 - e. His leave to Appeal out of time to the Court of Appeal was also refused and he was ordered to pay a cost of \$3,000.00.
24. When the aforesaid Judgments, Rulings and the Sentence imposed on him are in force and remain intact, without being varied or vacated, this Court cannot make an order for the sale of the subject matter land as moved by the Originating Summons filed by the Plaintiff on 17th November 2021. In view of the above, unless the parties have mutually agreed for the sale and on the value of the subject matter land, no order for sale can be made by this Court in contravention of the Judgment dated 15th July 2015 pronounced in the High Court of Suva Probate Action No; HPP -06 of 2010.

25. In view of the above, I find that the Application to this Court by the Plaintiff is a clear abuse of process of the Court, and the Plaintiff deserves to be dealt with severely in terms of costs, which I summarily assess as \$3,000.00 (Three Thousand Fijian Dollars) payable by the Plaintiff to all contesting (6) Defendants at the rate of \$500.00 each.

F. FINAL ORDERS:

- a. The Plaintiff's claim (Application) by way of his Originating Summons for the sale of the subject matter Land fails.
- b. The Plaintiff's Originating Summons filed on 17th November 2021 is hereby dismissed.
- c. The Plaintiff shall pay the 1st, 2nd, 4th, 5th, 6th and 7th Defendants a sum of \$500.00 Fijian dollars (Five Hundred) each as summarily assessed costs, totaling to \$3,000.00 within 28 days of this judgment.



A.M. Mohamed Mackie
A.M. Mohamed Mackie.
Judge

At the High Court of Lautoka on this 20th day of September 2023.

SOLICITORS:

For the Plaintiff:

For the 1st, 2nd, 5th, 6th & 7th Defendant:

Messrs Patel & Sharma

Ravneet Charan Lawyers